[1992] 43 ITD 154 (BOM.), (1993) 45 TTJ 77 (Bom)

IN THE ITAT BOMBAY BENCH 'A'

Smt. Hema Malini

vs

Income-tax Officer

M.A.AJINKYA, ACCOUNTANT MEMBER AND M.K. CHATURVEDI, JUDICIAL MEMBER

IT APPEAL NOS. 3734 TO 3737, 4122 TO 4124 (BOM.) OF 1986 [ASSESSMENT YEARS 1977-78 TO 1980-81]

DECEMBER 30, 1991

D.M. Harish, Shah and Gupta for the Appellant.

Keshav Prasad for the Respondent.

ORDER

Per M.A.Ajinkya, AM - These are seven appeals, four by the assessee relating to the assessment years 1977-78, 1978-79, 1979-80 and 1980- 81 and three by the Department relating to assessment years 1977-78, 1979-80 and 1080-81. All these appeals were heard together and are disposed of by a consolidated order. These are appeals against the orders of the Commissioner of Income-tax (Appeals) dated 24-6-1986 for the assessment years 1977-78 to 1980-81. The issue concerns the leviability of penalty under section 271(1)(c) of the Act, which for the relevant years amounted to Rs. 3,42,000; Rs. 2,20,470 Rs. 2,16,000 and Rs. 2,32,000 respectively. In para 3 of his order, the CIT (A) has given details of returned income, assessee income, concealed income and the penalties levied for the 4 years. The facts leading to the levy of these penalties are briefly as follows.

2. The assessee is a firm artist. She had offered an amount of Rs. 25,00,000 for taxation under the Voluntary Disclosure Scheme in 1971. therefore, on 13-10-1980, she made an application to the Commissioner of Income-tax, Central Range-II, Bombay, for setting the dispute about the admissibility of expenses in her assessments relating to the assessment years 1970-71 to 1978-79. A copy of this application dated 13th October 1980 is filed at pgs. 23 to 26 of the compilation (Vol. I). Apparently, she had also independently filed a petition under section 264 of the Act of the CIT, Central Range-II, Bombay, and an order on this revision petition was passed by the CIT on 18-6-1981. A copy of this order has been filed at pgs. 27 to 31 of the compilation. It is interesting to note that whereas the CIT passed an order on the revised petition under section 264 of the Act, the order passed by the

CIT on the assessee's application dated 13-10-1980 is not placed on record, on the ground that such order has not been made available to the assessee. In the course of hearing before us, we specifically called upon the Departmental Representative to find out from the office of the CIT concerned and furnish a copy of the order passed by the CIT on the assessee's settlement petition dated 13-10-1980, if any. Even the learned Departmental Representative has not been able to furnish a copy of such order. This fact is specifically stated because considerable stress on the non-availability of the order on settlement petition was placed by the learned counsel for the assessee Sri Harish at the time of hearing. In the order under section 264 of the Act dated 18-6-1981, the CIT dealt with assessment years 1976-77 and 1977-78 in paragraphs 6 & 10 respectively of the order. In para-7 relating to the assessment year 1976-77, the CIT observed that the ITO had disallowed expenses of Rs. 3,68,198 in computing income from profession and had of the settlement, an addition of Rs. 3,28,993 is to be made for the assessment year 1976-77. Consequently, the CIT granted relief of Rs. 39,205 because the ITO had made originally an addition of Rs. 4,50,000. It was pointedly brought to our notice by Sri Harish that although a substantial portion of the disallowance was sustained in terms of the settlement, no penalty was levied under section 27(1)(c) for the assessment year 1976-77. Shri Harish stressed this fact in support of his argument that the position for other assessment year under appeal was in this regard not any different from that for the assessment year 1976-77. All that was done in all these assessments was that a portion of the expenses had been disallowed and added to the total income of the assessee as a result of a settlement reached between the assessee and the Department. Such disallowance could not be construed on a settlement on concealment of income to merit penalty under section 271(1)(c).

So far as assessment year 1977-78 is concerned, the CIT in para - 10 gave the following finding :—

"Assessee disclosed gross professional receipts at Rs. 20,80,015. After deducting expenses claimed at Rs. 6,93,348 net income from profession was shown at Rs. 13,86,667. During the course of assessment proceedings, the ITO found that loan of Rs. 70,000 was wrongly shown by the assessee as receipts. On the other hand, the assessee omitted to disclose professional receipts of Rs. 40,000 in total income. The ITO made necessary adjustments for the above mistakes. The nature of a bank deposit of Rs. 20,000 was also not explained by the assessee. The same was, therefore, treated as income by the ITO. The ITO made various disallowances from expenses claimed by the assessee and worked out professional income at Rs. 17,18,333. Addition on account of disallowance of expenses and addition on account of unexplained bank deposit made by the ITO worked out to Rs. 3,31,666. The assessee has come up with application under section 264 against disallowance of expenses made by the ITO. The assessee has also come forward for settlement of income for this year also. According to the terms of settlement, additional income of Rs. 4,20,168 is to be added to the net income shown by the assessee for this year. Additional income as a result of settlement is higher than the disallowance made by the ITO. The case, therefore, does not call for reduction in expenses disallowed by the ITO. The application is rejected."

Since, according to the terms of settlement of Rs. 4.20,168 was agreed to be Added to the net income, the CIT did not give any relief for the same. It is in consequence of the above observation of the CIT that the assessment for the assessment year 1977-78 was reopened. Having stated these facts, Sri Harish argued that penalties were levied for concealment not as a result of any addition to concealed income as such, but on account of disallowances of expenditure. Such disallowances were made purely on an estimate in consequences of a settlement petition made by the assessee herself. There was no concealment of professional receipts. There was no finding that the expenses were inflated or that the expenses were non-genuine. The assessee had not kept back material facts. What has been disallowed is a part of the expenditure on the ground that such expenditure could not be treated as having been incurred for the purpose of business. No false explanation was given regarding any of the expenses on similar facts. Penalty was not levied for the assessment year 1976-77 and therefore even the Explanation to section 271(1)(c) was not attracted in the present case. Having stated these facts, Sri Harish relied on several decisions, and in particular, the decision of the Supreme Court in Sir Shadilal Sugar & General Mills Ltd. v. CIT [1987] 168 ITR 7051, CIT v. Haji Gaffar Haji Dada Chini [1988] 169 ITR 332 (Bom.) decisions of the Calcutta High Court in Girdharilal Soni v. CIT [1989] 179 ITR 1113, CIT v. National Alloy & Metal Works (P.) Ltd. [1989] 176 ITR 2994 and CIT v. Amalendu Paul [1984] 145 ITR 4395. Sri Harish also relied on the decision Of the Madhya Pradesh High Court in the case of CIT v. Punjab Tyres [1986] 162 ITR 517. Sri Harish then drew our attention to the details of expenses claimed and disallowed for all these years under appeal including assessment year 1976-77 which are given on pg. 1 of the compilation. It was Sir Harish's case that all such expenses were normal business expenses and the extent of disallowances of the total expenses claimed for the assessment year 1976-77 was 68.3% inasmuch as out of the total claim of Rs. 5,36,551, Rs. 3,66,554 was disallowed for this year. No penalty for assessment year 1976-77 was levied in respect of such disallowances. The disallowance of expenses of subsequent years, namely the years under appeal, varied between 59% and 40% of the total expenses claimed. Sri Harish pointed out that expenses disallowed were items like donations, service, expenses connected with dance training, and costumes, out of salaries and allowances, postage, car expenses, travelling and conveyance etc. Such disallowance could hardly be considered as concealment. They were made because the Department took the stand that such expenses could not be treated as expenses incurred for the purpose of business. Further, the assessee on order to settle her outstanding income-tax matters had made a petition to the Department under section 273A(4) on 18-3-1983 and as a consequence of the terms agreed upon while making the order on such settlement petition, the assessee had agreed to the disallowances as per the details given on pg. 1 Sri Harish stated that in the petition dated 13-10-1980 for settlement of assessments for the years 1970-71 to 1980-81, the petitioner stated that the was not sure if she was in possession in all material papers and documents. Most of the documents such as bank statements, vouchers, contracts, receipted challans, annuity polices, municipal assessment papers were either retained by the consultants of claimed to have been displaced. She pointed out the under the Voluntary Disclosure Scheme made by her in 1975 in which she had disclosed a sum of Rs. 25 lakhs, the entire backlog of income had been fully brought to tax. The assessee's father who was attending to all her tax

matter had a massive heart attack to which he succumbed in March 1977. Due to prolonged illness of her father and non-available of documentary evidence, the assessee could not comply with the requirement of law to the satisfaction of the ITO. The assessee was subjected to tax at the highest slab and to borrow funds on interest to clear up tax arrears. She therefore decided to approach the CIT for an amicable and reasonable settlement of all her tax matters. She made the following prayers in this petition :—

(a) The petitioner propose that in addition to the income declared in the returns for the assessment years 1974-75 to 1980-81 some reasonable additions may be made to cover up the disallowance of expenses and any other bona fide omission in view of the circumstances mentioned above.

(b) No penalties for concealment may be levied.

(c) No penalties or interest under any other section of Income-tax and Wealth-tax Acts may be levied.

(d) No prosecution against to petitioner may be lodged; and

(e) Reasonable time for payment of taxes may be allowed.

3. After referring to his petition, Sri Harish pointed out that no prosecution was launched and time was to the assessee for payment of taxes

In that sense, the prayers at (d) and (e) above were granted. Since the order of the Commissioner on this petition was not available, it was not possible to know what settlement was arrived at regarding the payment of penalties. But since this was basically a petition for settlement disallowances of expenditure claimed, no penalties for concealment should be levied and that was the prayer made in this petition. Thereafter, the assessee made another petition under section 273A(4) on 18-3-1983 for the assessment years 1971-72 to 1980-81) pp. 69 to 72). In this petition also the same prayers were made. In a letter addressed to the ITO on 9th March, 1984, in response to the notices issued by the ITO on 5-3-1984 to show cause why penalty should not be levied under section 271(1)(c), the assessee pointed out that she had made a petition to the Commissioner on 13-10-1980 for amicable settlement of all her outstanding assessments praying, inter alia, that (i) no penalty for concealment may be levied and (ii) no penalty or interest under any section of Income-tax and Wealth-tax may be levied and (iii) no prosecution against the petitioner may be launched. Having stated these facts, Sri Harish pointed out that penalties levied under the Wealth-tax Act were deleted by the Tribunal for the assessment years 1979-80 and 1980-81 in their order in WTA 326 & 327/Bom/88 (pp. 78 to 88 of the compilation). Sri Harish relied on para-7 of this order in which the Tribunal inter alia observed as follows:

"7. . . . . A cursory scrutiny of the expenses so claimed would show that these expenses were incurred on postage & telegrams, salaries & allowances, car expenses, dress making charges, office expenses. Dance training etc. and mostly

the expenses were disallowed on the ground that they were personal expenses. There is no finding that any portion of the expenses was incurred for acquisition on an asset. The addition on account of the disallowed portion of the expenses made to the total income of the assessee by way of settlement did not ipso facto mean that the assessee had deliberately failed to show the value of any asset acquired. It is further seen that for the assessment year 1977-78, when an addition of Rs. 10,06,161 was made in the computation of net wealth by treating the disallowed expenses as the assessee's net wealth, no penalty proceedings were started by the WTO. Similarly for the assessment year 1978-79, when a sum of Rs. 13,25,688 was added on the same count, no penalty proceedings were started by the WTO. This is the position for the immediately proceedings two years. For the subsequent years, i.e., for the assessment year 1980-81, the addition made by the WTO was deleted in appeal and such deletion has been accepted by the department. It would, therefore, mean that the addition to the net wealth made on the ground that the expenses claimed in the Income-tax assessment were not proved, does not necessarily mean that the assessee had concealed any asset which she had acquired out of such expenses. The fact that the assessee had offered these expenses as income in a settlement petition, and the further fact that the addition of such accumulated expenses in the wealth-tax assessment of the assessee was confirmed by the Tribunal, do not, in our opinion, lead to the conclusion that such net wealth represented the value of assets were deliberately concealed by the assessee.

Sri Harish then referred to the order of assessment for the assessment year 1977-78 and pointed out that nowhere in the order had the Assessing officer given a finding that there was a concealment or that the expenses claimed were bogus. Disallowance was made as a consequence of the settlement with the Commissioner for which the assessee had filed a petition as stated above on 13-10-1980. Since there was no finding of concealment of income or furnishing of inaccurate particulars of income, there was no case for penalty under section 271(1)(c).

4. The learned Departmental Representative, on the other hand, argued that this was a case where the assessee had filed inaccurate particulars of income for the assessment years concerned. The income returned was Rs. 13.28 lakhs and the reassessment made under section 147(b) had resulted on an estimate of Rs. 18.46 lakhs. At least on certain items, it could be said that the assessee was guilty of furnishing inaccurate particulars, inasmuch as books of account were not properly maintained, and personal items of expenses like salaries paid to the account clerks, servants, etc., were claimed as deduction. The learned Departmental Representative relied on the decision of the Supreme Court in G.C. Agarwal v. CIT [1990] 186 ITR 571 to argue that even if a revised return is filed, provisions of section 271(1)(c) are attracted. He relied on a decision of the Madras High Court in CIT v. Krishna & Co. [1979] 120 ITR 144 to argue that even if an assessment is made on an agreed accrued basis, that fact by itself does not absolve the assessee of the charge of concealment. For the same proposition, he relied on the decision of the Bombay High Court in CIT v. Daimler Benz A.G. [1977] 108 ITR 961 (FB). He also cited a decision of the Bombay High Court in Western Automobiles (India) v. CIT [1978] 112 ITR 1048 and the decision of the Calcutta High Court in CIT v. P.B.

Shah & Co. (P.) Ltd. [1978] 113 ITR 587 . In reply, Sri Harish pointed out that the account clerks had to be engaged to maintain cash books and ledger. Out of all the 5 servants engaged by the assessee, whose salaries were possibly disallowed as personal expenses, several of such servants were required to assist the assessee in her dance tours, preparation of her costumes dresses etc., required for such tours.

5. We have carefully considered the submission made on either side and we have gone through the case-law sighted. In our opinion, on the facts stated before us, penalties for concealment of varying amounts for the 4 years concerned cannot be sustained. The CIT(A) has confirmed the penalties partially for the assessment years 1977-78, 1979-80 and 1980- 81 and wholly for the assessment year 1978-79. Firstly, the CIT(A) has held that there is wide variation between the returned income and the assessed income for all these years. The settlement proceedings are only for the determination of the total income and the assessee could not be said to be doing any favour by furnishing figures of total assets and liabilities, receipts and expenses. The CIT(A) has observed that penalty could be levied under the provision prevailing for the relevant years "for furnishing inaccurate particular of income" which term has wider implications. He has also invoked Explanation 1 to section 271(1)(c) and has observed that when the assessee herself offers certain amounts as income over and above the amount returned, it cannot be said anything other than concealment. He has discussed the case-law and also the position year-wise. After going through the rationale adopted by the CIT(A) in his order, and after considering the facts on record, we are of the view that the impugned penalties cannot be sustained. The assessee had made a voluntary disclosure of her income in 1975 when she offered Rs. 25 lakhs as income under that scheme. She filed a revision petition under section 264 of the CIT for 1975-76, 1976-77 and 1977-78 against the assessment orders originally passed, which petition was disposed of by the CIT, Central Range-II, Bombay on 18-6-1981. By and large such petition was filed for settling the figure of disallowance of expenses and the order of the CIT under section 264 clearly shows that the original addition on account of the disallowance of expenditure was modified in the said order. Even before the order of the CIT under section 264 was received by the assessee, the assessee chose for reasons not clear from the record to file what she described as a petition for settlement on 13-10-1980. This settlement petition was considered and figure of disallowance was arrived at possibly in an order made on such petition which order was not furnished to the assessee nor is it available before us. As pointed out earlier, the learned Departmental Representative has expressed his inability to produce this order. We are therefore not clear whether while determining certain figure of disallowance, the Commissioner concerned had also given any directions about exemption the assessee from penalty for alleged concealment. Since for the assessment year 1977-78, the figure of disallowance of expenses was determined at Rs. 4,20,168, the Commissioner did not give any relief for that year but the assessment for that year was reopened on the basis of what the Commissioner has stated in his order under section 264, the relevant part of which (para-10) has been reproduced hereinabove. Disallowance made on similar basis for the assessment year 1976-77 has not invited any penalty for concealment. While furnishing the details of penalties levied (vide para-2 of the compilation) the assessee has pointed out that for the assessment year 1977-78, apart from making

disallowance of Rs. 4,20,168 as per the settlement of income on the petition dated 13-10-1980 to which the Commissioner has made reference in his order under section 264, there were further disallowances of Rs. 19,570 and addition for Rs. 50,000 as deposits in bank considered as professional income. The penalties levied by the ITO were reduced by the CIT(A) for the assessment year 1977-78 from Rs. 3,40,000 to Rs. 3,23,100, for the assessment year 1979-80 from Rs. 2,16,000 to Rs. 1,50,230 and for the assessment year 1980-81 from Rs. 2,32,000 to Rs. 1,81,100. The penalty for the assessment year 1978- 79 has been fully confirmed. We find that in the disallowances made for the years concerned, there are certain items which have been disallowed because of difference of opinion between the assessee and the assessing authority. This aspect of the matters was accepted by the Commissioner for the assessment years 1977-78 & 1979-80 as well as 1980-81. Inasmuch as interest from Jaycee Chemicals was taxed on accrual basis whereas the assessee has adopted cash system. Therefore, even the CIT(A) has to some extent accepted that there can be a difference of opinion about the items which have to be disallowed or can be disallowed Full details about the expenses claimed were given and it is only some aspect of the expenses like Diwali expenses, staff welfare expenses, travelling expenses etc. which contained an element of personal expenditure which has been disallowed. Full details of such expenses relating to 1976-77 have been filed. For the assessment for 1978-79 which is made under section 143(3) (and not under section 148(3) as mentioned by the Assessing Officer), the Assessing Office has stated that it has been agreed that additional income from profession of Rs. 3,19,527 shall be assessed for assessment year 1978-79. There is no basis for such statement. Copy of the order on settlement petition as has been stated earlier, has not been made available. What is added for this year is expenses disallowed as in the earlier two years on the figure of which there was some kind of an agreement between the assessee and the Commissioner. Even for the assessment year 1979-80, the addition of income was made as per the settlement which was also in respect of expenses to be disallowed. Same is the position for the assessment year 1980-81. The perusal of all these orders showed that there is no finding regarding concealment of a specific item of income. What is added is an amount as per the settlement on the assessee's petition, and that amount, as per the terms of the petition, represents inadmissible expenses and not undisclosed income. The figure of inadmissible expenses was decided as per the order of the Commissioner on the settlement petition of the assessee, which order is not before us. On these facts, it can hardly be said that such additions represents concealed income of the assessee.

6. No doubt, penalty under section 271(1)(c) levied for the assessment year 1975-76 has been confirmed by the A-Bench of the Tribunal in ITA No. 2979/Bom/86 dated 5th July, 1990 (pp. 89-90 of the compilation) but the facts for that year were different and Sri Harish pointed out that a miscellaneous application has been filed against that order. However, the decision of the Tribunal in W.T. appeals in the assessee's case for the assessment years 1979-80 and 1980-81 is more relevant to the facts of the present case. This decision relates to penalties levied on the assessee in the same or similar circumstances.

7. The decisions cited on behalf of the assessee support the finding given by us. In the Supreme Court decision in Sir Shadilal Sugar & General Mills Ltd.'s case (supra). Their Lordship laid down the principles that from the assessee agreeing to additions to his income, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reason for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances but that does not absolve the revenue from proving the mens rea of quasi-criminal offence (emphasis provided). Similarly, in the case of Haji Gaffar Haji Dara Chini (supra) the Nagpur Bench of the Bombay High Court held that when the assessee offers some credits in respect of hundi loans for assessment and also stated that the penalty under section 271(1)(c) may be decided on the merits, this fact did not amount to an admission of concealment of income and the levy of penalty on such basis was liable to be quashed. In the present case, the assessee had specifically requested in the petition for settlement that she may not be penalised. The Calcutta High Court in the case of Girdharilal Soni (supra), had also applied the ratio of the decision Sri Shadilal Sugar & General Mills Ltd.'s case (supra) and held that if the assessee had agreed to the addition of a certain amount as its income in the assessment proceedings but nothing else was produced by the Department, that amount was really concealed income of the assessee and penalty could not be imposed. Same view was expressed by the Calcutta High Court earlier in the case of National Alloy & Metal Works (P.) Ltd. (supra). The Madhya Pradesh High Court in Punjab Tyres' case (supra) held that even in cases of agreed addition to the total income on account of unexplained investments, the Department had to prove by independent evidence in addition to the evidence already brought on record from various sources during the assessment proceedings that that amount represented concealed income of the assessee during the relevant accounting year.

8. The decisions cited by the learned Departmental Representative do not, in our opinion, support the case of the Revenue. In the case of G.C. Agarwal (supra), the Supreme Court was mainly dealing with the interpretation of Explanation to section 271(1)(c). In that case, the assessee had filed revised return disclosing much larger income than that disclosed in the original returns, but was unable to discharge the burden of proof under the Explanation. In the present case, no revised returns have been filed but the assessments have been made on the basis of settlement regarding expenses which are to be disallowed. Therefore, facts in this case are distinguishable. For the same reasons, the decision of the Madras High Court in the case of Krishna & (Coch.) (supra) also is distinguishable on facts. There, the assessee had agreed to addition of peak credits but this was done after the department had scrutinised the books of account of the assessee and what was added was admittedly an item of income nature. In the present case, the addition is of disallowable expenses made as a matter of settlement and not as a result of any investigation. The genuineness of expenses so claimed has not been challenged. They have been disallowed on the ground that some of the expenses are not allowable under the provision of the Income-tax Act. That fact by itself does not attract the provisions of penalty. The decision of the Bombay High Court in Western Automobiles (India)'s case (supra) and of the Calcutta High Court in P.B. Shah & Co. (P.) Ltd.'s case (supra) concerned penalty levied on an addition of cash credits, where again the facts are distinguishable for the reasons as were stated above. We

are, therefore, of the view that on the facts and circumstances of the case and having regard to the principles laid down by the Supreme Court and other High Courts, to which detailed reference has been made, the penalties levied in the present case for all the four years cannot be sustained and have to be deleted.

9. We will now deal with the departmental appeals relating to the assessment years 1977-78, 1978-79 and 1980-81. The common ground in all these appeals is that the CIT(A) erred in holding that the additions of Rs. 32,724 for the assessment year 1977-78, Rs. 59,774 for the assessment year 1979-80 and Rs. 9,600 for the assessment year 1980-81 should not be considered while leaving penalty under section 271(1)(c). We have in the preceding paragraphs held that there is no case for sustaining any penalty at all on the facts and circumstances of the case for the reason discussed at length therein. In view of this finding, we find no substance in these departmental appeals, which are consequently dismissed.